87-1372

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND UNITED CARRIERS, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act of 1976 (FSIA) is the exclusive jurisdictional basis for suits against foreign states in the courts of the United States.

2. Whether in passing the FSIA Congress tacitly approved suits by aliens against foreign states under the Alien Tort Statute of 1789 which empowers district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations."

3. Whether a court of the United States has personal jurisdiction to hear a claim by an alien against a foreign state for a tort alleged to have been committed by its armed forces on the high seas in violation of international law.

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a, *infra*) is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (App. 25a-35a, *infra*) is reported at 638 F.Supp. 73 (1986).

JURISDICTION

The judgment of the court of appeals was entered September 11, 1987 (App. 22a, *infra*). The petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on November 18, 1987 (App. 24a, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall be . . . deprived of . . . liberty, or property, without due process of law;
> . . .

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, reads in relevant part as follows:

> **§ 1330. Actions against foreign states**
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has not been made under section 1608 of this title.
>
> . . . .
>
> **§ 1604. Immunity of a foreign state from jurisdiction.**
>
> Subject to existing international agreements to which the United States is a party

> at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in section 1605 to 1607 of this chapter.
>
> **§ 1605. General exceptions to the jurisdictional immunity of a foreign state.**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (5) not otherwise encompassed in paragraphs (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

3. The Alien Tort Statute of 1789, 28 U.S.C. § 1350, reads as follows:

> **§ 1350. Alien's action for tort**

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

Respondents United Carriers, Inc. ("United Carriers") and Amerada Hess Shipping Corporation ("Amerada Hess"), two Liberian corporations, sued the petitioner in the district for an alleged tort committed in violation of international law on the high seas. The gravamen of respondents' claim was that during the Falkland Islands/Malvinas conflict between Argentina and the United Kingdom in 1982 Argentine aircraft attacked and caused the loss in the South Atlantic of a vessel owned by United Carriers and chartered by Amerada Hess.

Specifically, United Carriers' complaint alleged that it was the owner of a Liberian-registry tanker, the HERCULES; that the vessel was engaged in carrying crude oil from Alaska, via the Cape Horn, to a refinery in the Virgin Islands; that on June 8, 1982, while on a return voyage under ballast from the Virgin Islands to Alaska, the HERCULES was attacked and bombed in the South Atlantic by aircraft of the Argentine armed forces; that as a result of these attacks the vessel suffered damages and was diverted to the port of Rio de Janeiro where it was determined that an undetonated bomb was lodged in one of the vessel's tanks; that some six weeks later the owners decided to scuttle the vessel to avoid the risks inherent in an attempt to remove the undetonated bomb; and that the vessel was scuttled in the Atlantic on July 20, 1982, some 250 miles off the coast of

Brazil. United Carriers claimed damages for the loss of the vessel in the amount of $10 million. It sought to vest jurisdiction in the district court exclusively under the Alien Tort Statute, 28 U.S.C. § 1350.

The factual allegations in Amerada Hess' complaint paralleled those in United Carriers' complaint. As to damages, Amerada Hess asserted that it had entered into a time-charter for the HERCULES with United Carriers and that at the time the HERCULES was scuttled it carried bunkers owned by Amerada Hess valued at some $1.9 million, for which amount it claimed damages. Amerada Hess sought to vest jurisdiction in the district court on three separate bases: the Alien Tort Statute, general admiralty and maritime jurisdiction, and universal jurisdiction for violations of international law.[1]

Petitioner moved to dismiss under Rule 12(b), F.R.Civ.P., for lack of subject matter and personal jurisdiction, and the district court dismissed the suits for lack of subject matter jurisdiction (App. 35a). The district court concluded that the FSIA was the exclusive source of jurisdiction in suits against foreign states and that the petitioner was immune from suit under the express provisions of that Act (App. 28a-31a). The court did not address the question of personal jurisdiction.

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[1] Both respondents expressly disclaimed reliance on the FSIA as a jurisdictional predicate for their suits (App. 38a, 41a), although they caused service of their complaints to be made on the petitioner's Minister of Foreign Affairs in conformity with the service provisions of § 1608(a)(3) of the FSIA, *viz.*, by mailing the summonses, complaints and the statutory notices of suit to him (*ibid.*).

The district court rejected respondents' contention that the Alien Tort Statute provided an independent source of jurisdiction for suits against foreign states when the aggrieved party is an alien. It further rejected respondents' argument that Congress, in passing the FSIA, intended to preserve those provisions of the First Judiciary Act, which, according to respondents', allowed aliens to assert claims against foreign sovereigns for violations of international law. The district court concluded (App. 31a):

> Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiffs' contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiff's version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

The district court also rejected Amerada Hess' alternative claim that the district court hear its civil claim against petitioner based on the "principle of universal jurisdiction," holding that doctrine only provides for criminal jurisdiction (App. 35a).

On appeal, a divided panel of the court of appeals reversed. The majority held that the FSIA did not preempt the jurisdictional grant of the Alien Tort Statute and that the district court was competent to hear respondents' claims under that Act (App. 10a).

In the majority's view it was irrelevant that a court faced with the circumstances of this case when the First Judiciary Act was enacted two centuries ago would not have exercised jurisdiction over a foreign sovereign (App. 8a). Since in the majority's view the Alien Tort Statute contained a jurisdictional grant based on the "evolving standards of international law" (App. 9a), and since "attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law" under existing international standards (App. 7a), respondents could invoke the aid of a United States court under the Alien Tort Statute to assert their claims against the offending foreign state.

Turning to the jurisdictional provisions codified in the FSIA for suits against foreign states, the majority acknowledged that some three years earlier—in *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115, *cert.denied*, 496 U.S. 1086 (1984)—the Second Circuit had held that "the [FSIA] insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act" (App. 11a), and that this Court "expressed similar views" in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (*ibid.*). Stating that "the view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history" (*ibid.*), the majority proceeded to "a close examination" of the legislative history of the FSIA and concluded that in enacting the FSIA "Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here" (*ibid.*). In the majority's view, the focus of the FSIA was

principally on "commercial concerns" (App. 12a), and international law violations outside the commercial context—such as confiscations—"were not the focus of the 'comprehensive' language of the drafters of the FSIA any more than they were the focus of the Supreme Court in the *Verlinden* case" (*ibid.*). The majority concluded that—

> Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

(App. 13a).

The majority then addressed the question of personal jurisdiction over the petitioner, recognizing that "even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant" (App. 14a). The majority concluded that petitioner's actions, as alleged, had a sufficient nexus with the United States so that the exercise of personal jurisdiction would not offend notions of fair play and substantial justice as mandated by the Due Process

Clause. It deemed the following factors of jurisdictional significance (App. 14a-15a):

> — Argentina was on notice that it might be sued here;
>
> — The United States had notified Argentina that the HERCULES would be passing through the South Atlantic on neutral business;
>
> — The vessel was plying the United States domestic trade;
>
> — Argentina was aware of the United States' interest in protecting the freedom of the high seas;
>
> — Argentina has the means to defend a suit in the United States;
>
> — If the United States were to decline jurisdiction, substantive policies of international law would be undermined; and
>
> — Fairness favors the exercise of jurisdiction, since the respondents claimed that they were unable to obtain a remedy in Argentina.

In light of these factors, the majority concluded that there is "no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here" (App. 15a). In consequence, the court of appeals reversed and remanded the cases to the district court for further proceedings.[2]

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[2] At the invitation of the court of appeals, the United States filed an *amicus* brief; the United States urged affirmance of the dismissal of the complaints for lack of jurisdiction.

The dissenting judge expressed skepticism at the notion that, in enacting the Alien Tort Statute, the First Congress intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," in light of the settled rule that federal court subject-matter jurisdiction is not a matter of common law (App. 19a).

In the dissenter's view, the express provisions of the FSIA and its legislative history made it abundantly clear that—

> (1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the judgment of the district court dismissing this action.

(App. 21a).

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN TOTAL DISREGARD OF A GOVERNING ACT OF CONGRESS, IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT, AND IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

Contrary to the majority's holding below, the FSIA is an all-encompassing statute which sets forth both the substantive and procedural standards that govern

all suits that may be brought against foreign nations in state and federal courts in the United States. Although the statute provides that judicial, rather than executive, authorities should determine claims of foreign states to sovereign immunity from suit, it mandates that they must do so "*in conformity with the principles set forth in this chapter*" (§ 1602, emphasis added). The principles prescribed by Congress in the FSIA embody the "restrictive" theory of sovereign immunity—*Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983)—under which foreign nations are subject to suit only "insofar as their commercial activities are concerned," *i.e.*, for activities *jure gestionis* (§ 1602). With one exception noted below, noncommercial, governmental or sovereign activities of foreign states—activities *jure imperii*—cannot be made the subject of suit in the courts of the United States as a matter of established international law which Congress expressly incorporated into the FSIA.

To achieve these goals, the FSIA broadly provides that federal district courts "shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state . . . as to any claim . . . with respect to which a foreign state is not entitled to immunity" under the terms of the statute or any applicable international agreement (§ 1330(a)). The FSIA announces detailed standards for determining when immunity is to be accorded. The fundamental principle on which the statute is structured is that foreign states are "*immune from the jurisdiction of the courts of the United States* and of the States" unless an exception is found within the statute or applicable international agreements (§ 1604, emphasis added). Statutory exceptions from this

general grant of immunity exist when immunity has been waived (§ 1605(a)(1)), when the claim arises from specified commercial activities of the sovereign state (§ 1605(a)(2)), when rights in property *taken in violation of international law are at issue* (§ 1605(a)(3)), when rights in specified property situated in the United States are involved (§ 1605(a)(4)), and when claims based on tortious injuries to persons or property occurring within the United States are in question (§ 1605(a)(5)). Finally, the FSIA also denies sovereign immunity in certain admiralty proceedings based on specified commercial activities engaged in by vessels of the foreign state (§ 1605(b)).

In addition, the FSIA sets forth detailed procedural rules for suits against foreign states, including special rules governing venue (§ 1391(f)), jury trial (§ 1330(a)), service of process (§ 1608), answers to complaints (§ 1608), counterclaims (§ 1607), and default judgments (§ 1608(e)).

This comprehensive Congressional scheme makes it patent that the Act was intended to be the *sole* jurisdictional source for suits against foreign sovereigns.[3] Moreover, its legislative history makes it

[3] Since the enactment of the FSIA, six different panels of the court of appeals have uniformly held that in actions against foreign states the Act preempts all other jurisdictional statutes. *Proyecfin de Venezuela v. Banco Industrial*, 760 F.2d 390, 392 (2d Cir. 1985); *Canadian Overseas v. Compania de Acero*, 727 F.2d 274, 277 (2d Cir. 1984); *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir. 1984), *cert.denied*, 469 U.S. 1086 (1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 307-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (2d Cir. 1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 873, 879 (2d Cir. 1981); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979).

abundantly clear that the statute was expressly "*intended to preempt any other state or Federal law* (excluding applicable international agreements) for according immunity to foreign sovereigns . . . ." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., 12, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604, 6610 (1975). This balance, completeness and structural integrity of the FSIA conclusively refutes the majority's conclusion that "Congress was not focusing on violations of international law when it enacted the FSIA" (App. 11a).

The majority's view (App. 12a) that because the restrictive theory of sovereign immunity—and consequently the FSIA, which codified that theory—is concerned principally with the commercial activities of foreign states, suits drawing into issue a foreign state's governmental acts are not embraced by the statute, is bottomed on an appalling misapprehension of the restrictive theory of immunity as it developed in customary international law and as it was adopted by Congress in the FSIA. As the name suggests, the restrictive theory distinguishes between "governmental" or "sovereign" activities engaged in by states (*jure imperii*) and their private law activities—activities of the kind that may also be carried on by private persons (*jure gestionis*), *Restatement of the Foreign Relations Law of the United States (Revised)* (Tent. Draft No. 2, March 1981) § 451 (adopted May 1986)("*Revised Restatement*"). It is the essence of the restrictive theory to "restrict" or limit the jurisdictional immunity of foreign states to acts *jure imperii*, and to deny immunity for acts *jure gestionis*. The majority's focus on only that leg of the restrictive theory which defines the circumstances under which

states are not immune from suit to the total neglect of the other leg of the theory which *mandates* immunity constitutes an egregious error.

The majority's discrepant view is also plainly refuted by the explicit provision of § 1604 which provides in language admitting of no ambiguity that *a foreign state is immune from jurisdiction of federal and state courts*, subject only to the set of exceptions specified in §§ 1605 and 1607, and express jurisdictional provisions in treaties or international agreements to which the United States is a party which may provide a different rule. *See also* H.R. Rep.No. 94-1407, *supra*, at 17, [1975] U.S. Code Cong. & Admin. News at 6616: "Section 1604 would be the *only* basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State Court in the United States" (emphasis added).

In *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, this Court painstakingly reviewed the provisions of the FSIA and its legislative history and concluded that the statute "contains a comprehensive set of legal standards governing claims of immunity *in every civil action against a foreign state* . . ." (461 U.S. at 488, emphasis added). Elsewhere in *Verlinden*, the Court emphasized that the FSIA was "clearly intended to govern *all actions* against foreign sovereigns" (461 U.S. at 491 n.16, emphasis added).[4]

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[4] Every Circuit Court of Appeals that has addressed the issue agrees that the FSIA provides the exclusive basis for federal jurisdiction in civil actions against foreign states and their agencies. *See, City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985), *Yugoexport, Inc. v. Thai Airways Intern. Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986); *MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987).

In the words of the dissenting judge below, "it is clear from both the statutory language and the legislative history that . . . the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity." (App. 21a).

The dissenter's conclusion that federal courts are not vested with subject-matter jurisdiction in suits against foreign states under the Alien Tort Statute is unassailable.[5] The court of appeals erred in disre-

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[5] The D.C. Circuit is the only appellate court which has addressed the question whether the FSIA preempts any arguable jurisdictional grant in the Alien Tort Statute for claims against foreign states. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), the court affirmed *per curiam*, with three separate concurring opinions, a dismissal of a suit against Libya and certain Arab organizations seeking damages for a terrorist attack in Israel. While the concurring opinions differed widely as to the construction of the Alien Tort Statute in suits against non-sovereign parties, two members of the panel expressly found that suit against the state of Libya was barred by reason of the exclusive jurisdictional grant contained in the FSIA. 726 F.2d at 776 n.1 (Edwards,J.) and at 805 n.13 (Bork,J.).

See also, In Re Korean Air Lines Disaster of September 1, 1983, 597 F.Supp. 613 (D.D.C. 1984) (Alien Tort Statute does not confer competence on district courts in suits against a foreign state); *Siderman v. Republic of Argentina*, No. CV 82-1772-

garding the express provisions of § 1604 of the FSIA, the statute's legislative history and this Court's binding precedent in *Verlinden*.

The majority's view that in enacting the FSIA Congress did not evidence a clear design "to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law" (App. 12a) is patently erroneous. Its holding that the Alien Tort Statute provides a cause of action and subject matter jurisdiction where the FSIA expressly forbids it would make a nullity of the FSIA, and merits review by this Court.

B. THE COURT OF APPEALS' HOLDING THAT PERSONAL JURISDICTION OVER THE PETITIONER MAY BE ASSERTED IN THIS CASE IS IN CONFLICT WITH THE DUE PROCESS CLAUSE AND APPLICABLE DECISIONS OF THIS COURT

The majority of the panel correctly recites the fundamental constitutional principle that "a non-resident defendant must have sufficient contacts with the forum" (App. 14a) before a court of the United States can lawfully hear a claim against him. The majority, however, then engages in a sophistical analysis to reach the untenable conclusion that the petitioner has the requisite substantial contacts with the United States.[6] The majority's personal jurisdiction analysis

RMT (C.D.Cal., March 7, 1985) (same); *contra*, *Von Dardel v. U.S.S.R.*, 623 F.Supp. 246 (D.D.C. 1985)(alternative holding).

[6] Because of its disregard of the FSIA's provisions dealing with subject-matter jurisdiction, the majority also disregarded the Act's built-in provisions governing assertions of personal jurisdiction against foreign states. This Court succinctly summarized the statutory scheme in *Verlinden*, *supra*, as follows:

> Under the Act, however, both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject-matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605-1607 . . . or under any applicable international agreement"; § 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction exists under subsection (a) and service of process has been made under 28 U.S.C. § 1608. Thus, *if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter and personal jurisdiction.* [461 U.S. at 485 n.5, emphasis added.]

Clearly, therefore, § 1605's itemization of non-immune transactions is a prescription of "the necessary contacts which must exist before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, *supra*, at 13, [1975] U.S. Code Cong. & Admin. News at 6612.

[7] It is open to doubt whether a bombing by a belligerent state of a neutral vessel in international waters, whether deliberate or accidental, is akin to piracy or genocide under international law.

begins with the observation "that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur. . . . The allegations here probably fall within this class of offense." (App. 14a.)[7] This observation is irrelevant to a Due Process analysis and the majority's reliance on § 404 of the *Revised Restatement* (Tent. Draft No. 6, 1985; adopted May 1986) is wholly misplaced. That section, entitled "Universal Jurisdiction to Define and Punish Selected Offenses," treats with "Jurisdiction

to Prescribe"[8]—the capacity of a state under international law *to make* a rule of law.

The pivotal inquiry here is whether under the circumstances of this case a state may under international law exercise jurisdiction *to adjudicate* a claim of law—to assert *in personam* jurisdiction over persons or legal entities—a subject that is dealt with under the heading of "Jurisdiction to Adjudicate" in § 421 of the *Revised Restatement*[9]. The majority patently confuses the distinct concepts of jurisdiction to prescribe and jurisdiction to adjudicate.

The concept of "universal" offenses connotes that any state may prescribe substantive rules prohibiting certain conduct and that it may enforce those rules *if* it gets hold of the alleged offender. It has nothing to do with the state's authority to subject an alleged offender to the process of its courts. See § 401 of the *Revised Restatement*.

It is established international law that action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or to enforce is a violation of international law, giving rise to the international responsibility of the state. *Restatement (Second), supra*, § 8. Consistently with this international law principle, it is settled constitutional doctrine in this country that "due process requires . . . that in order to subject a defendant to a judgment in personam, if he be not present within the territory

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[8] The *Restatement (Second) of the Foreign Relations Law of the United States* § 6, comment (1965)("*Restatement (Second)*"), referred to that subject as "legislative jurisdiction."

[9] The *Restatement (Second)* referred to that subject as "jurisdiction to enforce." *Id.* at §§ 6-7.

of the forum, *he* has certain minimum contacts with [the forum]." *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added).[10] And *Hanson v. Denckla*, 357 U.S. 235 (1958), made it even more explicit that it is *the defendant's*, not the plaintiff's, contacts with the forum which are pivotal to a Due Process analysis:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential that in each case that there be some act by which the *defendant* purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253 (emphasis added). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980). And only last Term, in *Asahi Metal Industries Co. v. Superior Court*, ___ U.S. ___, 107 S.Ct. 1026, 1033 (1987), the Court reemphasized that, for Due Process purposes, the affiliating connection between the forum state and the nonresident defendant "must come about *by an action of the defendant purposefully directed towards the forum state*" (emphasis added).

The record here is barren of any affiliating contacts by the petitioner with the United States in relation

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[10] In enacting the FSIA, Congress expressly incorporated the Due Process principles enunciated in *International Shoe*. H.R. Rep. No. 94-1407, *supra*, at 13, [1975] U.S. Code Cong. & Admin. News at 6612.

to the claims asserted. The links which the majority finds to be constitutionally adequate do not bear scrutiny:

a) the majority's statement that the petitioner was "on notice that it might be sued here" (App. 15a) is devoid of legal or rational support. If one were to indulge in the assumption that petitioner was charged with knowledge of the intricacies of American Constitutional law and international law as applied in the United States under the rubric of "foreign relations law of the United States," the only rational conclusion one could draw is that petitioner was on notice of the *International Shoe* doctrine. Petitioner would further be chargeable with notice that Congress, in enacting the FSIA, was aware of concerns that "our courts [not be] turned into small 'international courts of claims[,]' . . . open to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." (Testimony of the Department of Justice's representative on the FSIA, quoted in *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 461 U.S. at 490);

b) the fact that the United States had notified the petitioner that the HERCULES would be passing the South Atlantic on neutral business (*ibid.*) is an act performed by the United States, not an action of the petitioner purposely directed at the United States;

c) the circumstance, as characterized by the majority, that the HERCULES "was plying the United States domestic trade" (App. 15a)[11] and that *the vessel*

[11] The circumstance that the HERCULES, a Liberian vessel, was on the high seas "transporting oil from one part of the United States to another part of the United States" (App. 15a) is of relevance to the enforcement of United States safety and environmental regulations against the *vessel*; *see*, *e.g.*, 33 C.F.R. § 157.03(2), Coast Guard regulations defining "domestic trade." Contrary to the majority's implication, this does not mean that a foreign-flag vessel in international waters heading for an American port is within the territory of the United States, or that non-residents coming in contact with such a vessel on the high seas thereby establish a nexus with the United States.

or its owner or charterer had a relationship with the United States is of no moment to a Due Process analysis. This does not establish a link *by the petitioner* with the United States;

d) petitioner's awareness of the United States' interest in protecting the freedom of the high seas (*ibid.*) hardly satisfies the *constitutional* requirement that the *acts of the petitioner* which are alleged to have caused injury to the respondents have certain minimum contacts with the United States;

e) petitioner's ability to defend a suit (*ibid.*) in the United States is plainly irrelevant to a Due Process analysis;

f) the majority's observation that if the district court here were to decline jurisdiction "substantive policies of international law will be undermined" (*ibid.*), manifestly does not furnish an affiliating link with the United States. Moreover, it is established doctrine in this country that decisions concerning foreign policy are political, not judicial in nature. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948);

g) the majority's final remark that fairness favors exercise of personal jurisdiction over the petitioner

here since respondents were denied a judicial remedy in Argentina under Argentine law (App. 15a) is, to say the least, ironic. That same court only recently affirmed the denial of a judicial remedy against the United States under United States law to a Norwegian shipowner whose vessel was damaged when it struck a mine in a Nicaraguan harbor that was alleged to have been surreptitiously mined by an agency of the United States on the basis that the suit presented non-justiciable political questions. *Chaser Shipping Corp. v. United States*, 649 F.Supp. 736 (S.D.N.Y. 1986), *aff'd*, April 27, 1987 (No. 87-6027, 2d Cir.; unpublished opinion), *cert.denied*, November 11, 1987 (56 U.S.L.W. 3453).

In sum, there is a total absence of affiliating contacts by the petitioner with the United States which would permit the assertion of *in personam* jurisdiction as a matter of constitutional law. The petitioner's lack of links of territoriality with the United States also renders the assertion of *in personam* jurisdiction over the petitioner under the circumstances of this case patently invalid as a matter of international law. *Revised Restatement, supra*, § 421. The majority's conclusion "that there is no constitutional bar to the district court's exercise of jurisdiction over Argentina here" (App. 15a) is also violative of the Fifth Amendment's Due Process Clause and disregards this Court's consistent and long-established constitutional holdings.

The Court should therefore review the unprecedented assertion of personal jurisdiction over a foreign state that has been mandated by the judgment of the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 16, 1988.

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 333, 334 August Term 1986

Argued: November 3, 1986
Last supplemental brief filed July 24, 1987

Decided: September 11, 1987
Docket Nos. 86-7602, 7603

AMERADA HESS SHIPPING CORPORATION,

Appellant,

— against —

ARGENTINE REPUBLIC,

Appellee.

UNITED CARRIERS, INC.,

Appellant,

— against —

ARGENTINE REPUBLIC,

Appellee.

FILED,
SEP 11 1987

Before: FEINBERG, Chief Judge, OAKES and KEARSE, Circuit Judges.

Amerada Hess Shipping Corporation and United Carriers, Inc. appeal decision of United States District Court for the Southern District of New York, Robert L. Carter,

J., finding their lawsuit against Republic of Argentina for violating international law barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611.

Reversed and remanded. Judge Kearse dissents in a separate opinion.

DOUGLAS R. BURNETT, New York, NY (Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, Richard H. Webber, of Counsel), for Appellant Amerada Hess Shipping Corporation; Burke & Parsons, New York, NY (Raymond J. Burke, Jr., Frances C. Peters, of Counsel), for Appellant United Carriers, Inc.

BRUNO A. RISTAU, Washington, DC (Kaplan Russin & Vecchi, Kaplan Russin Vecchi & Kirwood, New York, NY, Anthony E. Davis, of Counsel), for Appellee.

Frank L. Wiswall, Jr., Reston, VA, for The Republic of Liberia, as Amicus Curiae.

James T. Lafferty, New York, NY, for Seamen's Church Institute of New York and New Jersey, as Amicus Curiae.

Richard K. Willard, Assistant Attorney General, David Epstein, Michael J. Singer, Attorneys, Civil Division, Department of Justice, Washington, DC, Rudolph W. Giuliani, United States Attorney, New York, NY, Abraham D. Sofaer, Legal Adviser, Elizabeth Verville, Deputy Legal Advisor, Bruce C. Rashkow, Eugene Pinkelmann, Attorneys, Department of State, Washington, DC, for the United States of America, as Amicus Curiae.

FEINBERG, Chief Judge:

This case presents the important question whether a federal district court has jurisdiction over a claim that a foreign sovereign, in violation of international law, attacked on the high seas a neutral ship engaged in the United States domestic trade. Amerada Hess Shipping Corporation (Amerada) and United Carriers, Inc. (United) appeal from a decision of the United States District Court for the Southern District of New York, Robert L. Carter, J., dismissing their complaint for lack of jurisdiction, 638 F. Supp. 73 (S.D.N.Y. 1986). Appellants argue that both the Alien Tort Statute, 28 U.S.C. § 1350, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-1611, provide jurisdiction over their claims that the Republic of Argentina destroyed an oil tanker on the high seas in violation of international law. We conclude that the Alien Tort Statute does provide jurisdiction and that the FSIA does not bar it. Accordingly, we reverse and remand to the district court.

I. Background

Because the district court dismissed United's complaint for lack of jurisdiction, we must accept appellants' allegations as true. In 1977, Amerada entered a long-term time-charter agreement with United for use of the oil tanker HERCULES. Amerada used HERCULES to carry oil from Alaska, around the southern tip of South America, to its refinery in the United States Virgin Islands. This route took HERCULES near the area in the South At-

lantic where, in April 1982, an armed conflict began between Argentina and the United Kingdom that became known in this country as the Falklands War.

On May 25, 1982, HERCULES embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like HERCULES) that would be traversing the South Atlantic, to ensure that these neutral vessels would not be attacked. The list included HERCULES.

By June 8, HERCULES was about 600 nautical miles off the Argentine coast and nearly 500 miles from the Falkland Islands, in international waters, well outside the "exclusion zones" declared by the warring parties. That afternoon, HERCULES was attacked without warning in three different strikes by Argentine aircraft using bombs and air-to-surface rockets.

Following these attacks, HERCULES, damaged but not destroyed, headed for safe refuge in the port of Rio de Janeiro, Brazil. Although HERCULES arrived safely in Brazil, her deck and hull had both suffered extensive damage, and a bomb that had penetrated her side remained undetonated in one of her tanks. Following an investigation by the Brazilian navy, United determined that it would be unreasonably hazardous to attempt removal of the undetonated bomb. Accordingly, on July 20, 1982, approximately 250 miles off the Brazilian coast, HERCULES was scuttled. United's loss on the sunken ship is claimed at $10,000,000 and Amerada's loss on the fuel that went down with the ship is claimed at $1,901,259.07.

Following a series of unsuccessful attempts to receive a hearing of their claims by the Argentine government or to retain Argentine attorneys to prosecute their claims in

the courts of that country, appellants filed their suits in the district court. The district court found that a "foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case." 638 F. Supp. at 75. Concluding that no FSIA exception covered these facts, the district court dismissed the suits for lack of jurisdiction. This consolidated appeal followed.

II. Violation of International Law

The facts alleged by appellants, if proven, would constitute a clear violation of international law. "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' " Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). Of course, the mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of international law. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation." Filartiga, 630 F.2d at 888. In this case, treaties, case law and treatises establish that Argentina's conduct, as alleged by appellants, violates settled principles of international law.

International treaties and conventions dating at least as far back as the last century recognize the right of a neutral ship to free passage on the high seas. Broad international recognition of the rights of neutrals can be found in paragraph 3 of The Declaration of Paris of 1856: "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."

A more contemporary statement of the international concern and accord on this issue may be found in The Geneva Convention on the High Seas of 1958 (Convention on the High Seas), to which both Argentina and the United States were signatories. The Convention on the High Seas maps the general usage and practice of nations with regard to the rights of neutral ships in time of war. Article 22 of that treaty states that a warship encountering a foreign merchant vessel on the high seas may not board her without grounds for suspecting her of engaging in piracy, or the slave trade, or traveling under false colors. Even when there are grounds for such suspicion, the proper course is to investigate by sending an officer to inspect the ship's documents or even to board her, not to commence an attack. If such inspection fails to support the suspicions, the merchant vessel shall "be compensated for any loss or damage that may have been sustained." Article 23 of the Convention on the High Seas makes similar provisions for aircraft that have grounds to suspect a neutral vessel. Clearly, Argentina's alleged conduct in this case, bombing HERCULES and refusing compensation, violates the Convention on the High Seas. More recently, the Law of the Sea Convention of 1982 explicitly incorporated these provisions into its text. Argentina is a signatory to the Law of the Sea Convention and the United States has endorsed the relevant sections of it.

Other international accords adopted by the United States supporting a similar view of the rights of neutral ships include The London Naval Conference of 1909, the International Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention, 1907) and the Pan-American Convention Relating to Maritime Neutrality of 1928, to which Argentina was a signatory. No agreement has been called to our attention that would cast doubt on this line of authority.

As to "judicial decisions recognizing and enforcing" the rights of neutral ships on the high seas, federal courts

have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution. See, e.g., Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 161 (1795); The Lusitania, 251 F. 715, 732-36 (S.D.N.Y. 1918) (dictum); cf. The I'm Alone (Canada v. United States), 3 U.N. Rep. Int. Arb. Awards 1609 (1933). Similarly, the academic literature on the rights of neutrals is of one voice with regard to a neutral's right of passage. See, e.g., Rappaport, "Freedom of the Seas," 2 Encyclopedia of Amer. For. Policy 387 (1978); Restatement of Foreign Relations Law of the United States (Revised) § 521 reporters' note 1, § 522 (Tent. Draft No. 6 1985).

In short, it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law. Indeed, the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas. Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law. See 4 W. Blackstone, Commentaries 68, 72. Argentina has cited no contrary authority. Accordingly, we turn to the jurisdictional ramifications of our holding that appellants have stated a claim of a violation of international law.

III. The Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations,

then the district court has jurisdiction. See Filartiga, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also, as discussed above, the suit alleges a violation of international law.

Argentina argues, however, that the Alien Tort Statute provides jurisdiction only over individuals, not over sovereign states. It claims that the United States recognized absolute sovereign immunity in 1789, when Congress enacted the Alien Tort Statute. Therefore, Argentina contends, if Congress had intended to provide jurisdiction over sovereigns, it would have done so explicitly.

As a preliminary matter, it may be—at least as to loss of a vessel under the circumstances alleged here—that absolute sovereign immunity did not govern when the Alien Tort Statute was enacted. Rather, courts considered the immunity that was granted to be merely "a matter of grace and comity on the part of the United States." Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). It was recognized that the United States had the power to exercise jurisdiction over a foreign sovereign, if it saw fit to do so. See The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 146 (1812). Thus, for example, if a foreign sovereign seized a vessel at sea in violation of the law of nations, "the prize property which [the vessel] brings into our ports is liable to the jurisdiction of our Courts," notwithstanding any claim of sovereign immunity. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 354 (1822). See also The Prins Frederik, 2 Dods. 451 (1820) (English case), in which the court indicated that it would have jurisdiction over a foreign sovereign that had violated the law of salvage, if the sovereign did not make "recompense" on its own.

We need not decide, however, whether a court faced with the circumstances of this case in 1789, the year the

Alien Tort Statute was enacted, would have exercised jurisdiction over a foreign sovereign. In construing the Alien Tort Statute, "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Filartiga, 630 F.2d at 881. The Alien Tort Statute is no more than a jurisdictional grant based on international law. The evolving standards of international law govern who is within the statute's jurisdictional grant as clearly as they govern what conduct creates jurisdiction. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 457 (1964) (White, J., dissenting) (under Act of State doctrine, "reasons for nonreview . . . lose much of their force when the foreign act of state is shown to be a violation of international law").

Thus, we must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign. For example, if a current norm of international law immunized sovereigns for behavior that, if committed by an individual, would be a violation of international law, such an action by a sovereign would not be a tort "committed in violation of the law of nations." The modern view, however, is that sovereigns are not immune from suit for their violations of international law.[1] See Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine, 23 Va. J. Int'l L. 191, 221-32 (1983); Bazyler, Litigating the International Law of Human Rights: A "How To" Approach, 7 Whittier L. Rev. 713, 733-34 (1985).

That international law currently denies immunity for violations of international law is not surprising, when one considers that international law consists primarily of rules guiding the conduct of nations. If sovereign acts were immunized today from scrutiny under international law,

[1] After argument, the panel requested and received supplemental briefs on this issue.

the exception would nearly swallow the rule. For example, the emerging international law prohibition of genocide, see D'Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110, 1127-29 (1982), would make little sense, even in theory, if sovereign states were not covered by the prohibition. Indeed, the sovereign immunity defense raised by Nazi war criminals at the Nuremberg trials was rejected by the international tribunal. International Military Tribunal (Nuremberg), Judgment and Sentences (1946), reprinted in 41 Am. J. Int'l L. 172, 221 (1947). ("The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."). Since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case. We hold, therefore, that the Alien Tort Statute provides jurisdiction over Argentina.

IV. The FSIA

Argentina also contends that, regardless of whether the Alien Tort Statute would provide jurisdiction, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns. We undertake our review of the FSIA mindful of the tenet of statutory construction that "[w]here fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law." Restatement of Foreign Relations Law of the United States (Revised) § 134 (Tent. Draft No. 6, 1985). See The Charming Betsy, 6 U.S. (2 Cranch) 137, 143 (1804). Since international law would deny immunity in these circumstances, we would construe the FSIA to grant immunity only if Congress clearly expressed such an intent.

In support of its view that the FSIA preempts the jurisdictional grant of the Alien Tort Statute, Argentina points to the apparently comprehensive language of this

court in O'Connell Machinery Co. v. M.V. "Americana", 734 F.2d 115 (2d Cir.), cert. denied, 496 U.S. 1086 (1984): "The Foreign Sovereign Immunities Act insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act." Id. at 116. The Supreme Court has expressed similar views. See Verlinden, 461 U.S. at 496-97 (1983). The view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history. For example, the House Report explains that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. code Cong. & Admin. News 6604, 6610 (House Report). This authority accurately states the general rule. As discussed below, however, Congress was not focusing on violations of international law when it enacted the FSIA. Therefore, we do not believe these pronouncements were intended to cover all violations of international law in general and actions under the Alien Tort Statute in particular.

A close examination of the legislative history of the FSIA demonstrates that Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here. Congress sought to achieve three major goals through the FSIA. First, it intended to incorporate into United States law the "restrictive" theory of sovereign immunity in accordance with international law (no immunity for "commercial or private" sovereign acts). Second, it sought to make certain that the judicial rather than the executive branch would apply the law, so "that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report at 6606. Third, it hoped to eliminate many of the procedural problems that suits against foreign sovereigns create (e.g. service of process, execution of judgment) by providing comprehensive rules for these aspects of a suit. See House

Report at 6605-06. None of these goals suggests that Congress intended to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law.

The FSIA's focus on commercial concerns pervades the entire statute. The impetus for the enactment of the FSIA was Congress' awareness that the increased commercial interaction of foreign states with United States citizens "call[s] into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." House Report at 6605. Thus, the act adopted a theory of immunity whose focus is limited to commercial situations, and the non-consensual exceptions to sovereign immunity that it supplies are almost exclusively restricted to commercial activities as well. (The one major exception is section 1605(a)(5), which deals with private torts). International law violations are simply not discussed in the statute or the legislative history outside of the commercial context. Thus, international law violations were not the focus of the "comprehensive" language of the drafters of the FSIA anymore than they were the focus of the Supreme Court in the *Verlinden* case, 461 U.S. 480. We would consider it odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law.

The other goals of the FSIA, to place immunity decisions firmly in the courts, and to codify procedures for suits against sovereigns, do not suggest an intent to provide immunity for violations of international law outside of the commercial context. Prior to the FSIA, a foreign sovereign would frequently obtain immunity by seeking the intervention of the United States State Department. This left the State Department in an awkward position and parties dealing with foreign governments in an uncertain one. Id. at 6607. At the same time, the United States found that "[i]n virtually every country . . . sovereign immunity is a question of international law to be determined by the courts." Id. at 6608. Requests by the United States for immunity in foreign courts frequently failed. Id. at 6607. Accordingly, through the FSIA, Congress made immunity decisions the exclusive province of the courts. This provided certainty to parties coming into contact with foreign sovereigns and brought United States practice into conformity with the immunity practices of most other nations. The elimination of the executive branch's role in making immunity decisions certainly does not suggest an intent to provide immunity for violations of international law. Similarly, the procedural goals of the FSIA in no way require an implicit repeal of the jurisdictional grant of the Alien Tort Act; these procedural rules would simply apply to a suit under that statute as well.

Not only is the legislative history of the FSIA devoid of any indication that Congress intended the FSIA to bar jurisdiction under the unusual circumstances of this case, a suit under the Alien Tort Act for a violation of international law, but, in our view, construing the FSIA to require that result would actually frustrate Congress' purpose. The "central premise" of the FSIA was that 'decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which *incorporates standards recognized under international law.*" House Report at 6613 (emphasis added). Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

V. Personal Jurisdiction

Of course, even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant. Texas Trading & Miling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Under International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), a nonresident defendant must have sufficient contacts with the forum, so that the exercise of jurisdiction will not offend notions of fair play and substantial justice. In the international context, the "forum" that the contacts must relate to is the United States itself. See Texas Trading & Milling Corp., 647 F.2d at 314. Thus, we must examine the extent:

> to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Id. (citations omitted). See Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 Stan. L. Rev. 385, 404-407 (1982).

In this case, we find that the constitutional requirements for personal jurisdiction are satisfied. We note at the outset that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur. See Restatement of Foreign Relations Law of the United States (Revised) § 404 (Tent. Draft No. 6, 1985). The allegations here probably fall within this class of offense. Since, under international law, a state may punish these offenses even when they occur outside the state's territory, it has been argued that such occurrences always have sufficient "effects" within the United States to satisfy due process. See Paust, Draft Brief Concerning Claims

to Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law under the FSIA, 8 Hous. J. of Int'l L. 49, 69-70 (1985).

We need not decide that question in this case, however, since the actions alleged here are sufficiently related to the United States for Argentina to have been on notice that it might be sued here. Argentina was specifically notified by the United States that HERCULES would be passing through the South Atlantic on neutral business, clearly revealing to Argentina a United States interest in the ship and its safety. Furthermore, HERCULES was plying the United States domestic trade, transporting oil from one part of the United States to another part of the United States pursuant to a contract that called for payment in the United States. Of course Argentina was also aware of the obvious United States interest in protecting the freedom of the high seas.

Argentina, as a member of the community of nations, has naturally benefited from the freedom of the seas guaranteed by international law and the law of the United States. Obviously, Argentina has ready means to defend the suit here, and, if the United States declines to exercise personal jurisdiction, the substantive policies of the international law involved will be undermined. Considerations of fairness also weigh in favor of exercising jurisdiction since appellants have sought redress of their grievances in Argentina and were unable to obtain even a hearing. See World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980). Accordingly, we find that there is no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here.

VI. Conclusion

Our holding today is a narrow one. The FSIA is the sole source from which a foreign sovereign may obtain immunity and, ordinarily, it is the only basis on which a

court can exercise jurisdiction over a foreign sovereign. However, where an alien sues a foreign sovereign for a violation of international law, Congress has provided subject matter jurisdiction under the Alien Tort Statute. We realize that the question of the effect of these two statutes enacted by Congress is a difficult one.[2] We are heartened by the knowledge that, if we are mistaken, there is no bar to a statutory remedy. It should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. Moreover, the sovereign defendant or its action must have sufficient contacts to satisfy the constitutional requirements of personal jurisdiction. And finally, the procedural requirements of the FSIA, restricting execution of judgment for example, see Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985) would still have to be considered. See Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 Stan. L. Rev. 385, 392-93 (1985).

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[2] Other district courts that have directly considered these questions have reached varying conclusions. See Von Dardel v. Union of Soviet socialist Republics, 623 F. Supp. 246 (D.D.C. 1985) (finding jurisdiction); In re Korean Airlines Disaster of September 1, 1983), MDL No. 565, Misc. No. 83-0345 (D.D.C. Aug. 2, 1985) (finding no jurisdiction); Siderman v. The Republic of Argentina, (CV82-1772-RMT MCX)) (C.D. Cal. March 7, 1985) (finding no jurisdiction). We are informed that further proceedings are pending in *Von Dardel* and *Siderman*. Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

The judgment of the district court is reversed and the case is remanded for further proceedings.[3]

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[3] Appellants also argue that jurisdiction exists here under § 1605(a)(5) of the FSIA on the grounds that sinking a ship on the high seas is a tort "within the United States" and that disruption of contractual payments due in New York is an "injury occurring in the United States." See Texas Trading & Milling Corp., 647 F.2d at 312. In view of our disposition of this case, we need not consider these issues. We do note, however, that these arguments are not inconsistent with our holding, since a court could find jurisdiction for a tort under the FSIA, without deciding whether the tort is a violation of international law.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED CARRIERS, INC. & AMERADA HESS

Nos. 86-7602-7603

KEARSE, *Circuit Judge,* dissenting:

I respectfully dissent from the majority's conclusion that the district court has subject matter jurisdiction over the present suit to recover money damages from defendant Argentine Republic ("Argentina") for its bombing of a Liberian tanker in international waters some 600 miles from the Argentine coast. In my view, the majority has disregarded a clear Congressional intention to deny United States courts jurisdiction over such matters where, as here, the foreign state asserts a defense of sovereign immunity.

The majority holds that Argentina is not entitled to recognition of its claim of sovereign immunity, and thereby to have the case dismissed for lack of jurisdiction, because the Alien Tort Statute, codified at 28 U.S.C. § 1350 (1982), provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations. . . ." The majority views this provision as "no more than a jurisdictional grant based on international law," and rules that the scope of the grant depends on "[t]he evolving standards of international law." *Ante* at [10]. I disagree.

At the outset, it should be recognized that though substantive international law is part of the common law of the United States, *see Filartiga v. Pena-Irala,* 630 F.2d 876, 887 (2d Cir. 1980), federal court subject-matter jurisdiction is not a matter of common law. Such jurisdiction exists only to the extent that Congress has bestowed it,

"in the exact degrees and character which to Congress may seem proper for the public good." *Cary V. Curtis,* 44 U.S. (3 How.) 236, 245 (1845) (footnote omitted); *Sheldon v. Sill,* 49 U.S. (8 How.) 441 (1850). Thus, even assuming that when Congress passed the Alien Tort Statute in 1789 it intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," a premise of which I am skeptical, I cannot see how we can properly disregard the clearly restrictive provisions of the Foreign sovereign Immunities Act ("FSIA") passed in 1976, codified at 28 U.S.C. §§ 1330, 1602-1611 (1982), which were "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns." H.R. Rep. No. 1487, 94th Cong., 2d Sess. ("House Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News ("USCCAN") 6604, 6610.

Section 1602 of The FSIA provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [*i.e.,* 28 U.S.C. §§ 1602-1611]." To me, the plain language of this provision means that the FSIA established the exclusive framework within which the courts of the United States were, from 1976 onward, to rule on foreign states' claims of sovereign immunity.

If further clarification be required, the legislative history of the FSIA is replete with it. For example, the Report of the House of Representatives Judiciary Committee, in addition to stating that the FSIA was intended to preempt any other law with regard to foreign sovereign immunity, stated that the FSIA "sets forth the *sole and exclusive standards* to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." House Report 1976 USCCAN at 6610 (emphasis added). *See also id.* at 6604 (FSIA's purpose was "to define the jurisdiction of United States

courts in suits against foreign states [and] the circumstances in which foreign states are immune from suit"); *id.* (FSIA was designed "to provide when a foreign state is entitled to sovereign immunity"); *id.* at 6613 (FSIA "sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states"); *id.* at 6610 ("setting forth comprehensive rules governing sovereign immunity, the [FSIA] bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states . . ."); *id.* at 6611 (the bill added 28 U.S.C. § 1330, which "provides a comprehensive jurisdictional scheme in cases involving foreign states").

It is hardly surprising, therefore, that the United States Supreme Court has noted that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("*Verlinden*").

Looking to the substantive provisions of the FSIA, I see no basis for denying Argentina's claim of sovereign immunity in the present case. Section 1604 states, in pertinent part, that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Thus, the FSIA "starts from a premise of immunity and then creates exceptions to the general principle." House Report, 1976 USCCAN at 6616. "[I]f the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." *Verlinden*, 461 U.S. at 489 (footnote omitted). The exceptions created in §§ 1605-1607 center principally on the foreign state's conduct of commercial activities, plainly not at issue in the present case, and on noncommercial torts committed within the United States (*see* House Report, 1976 USCCAN at 6619: "the tortious act or omission must

occur within the jurisdiction of the United States . . ."), a condition also plainly not met here.

Finally, it is evident that in enacting the FSIA, Congress did consider and make provision with respect to claims of alleged violations of international law. Thus, the House Report noted that in only "two categories of cases [would § 1605(a)(3)] deny immunity where 'rights in property taken in violation of international law are in issue.'" House Report, 1976 USCCAN at 6618. The two categories involve cases where the property (or property exchanged for it) either (a) is present in the United States, or (b) is owned or operated by the foreign state claiming immunity. 28 U.S.C. § 1605(a)(3). Neither circumstance is present here.

In sum, I believe it clear from both the statutory language and the legislative history that (1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the judgment of the district court dismissing this action.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Nos. 86-7602, 7603

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the

eleventh day of September
one thousand nine hundred and eighty-seven.

Present:

Hon. WILFRED PEINBERG, Chief Judge,
Hon. JAMES L. OAKES,
Hon. AMALYA L. KEARSE,

Circuit Judges,

AMERADA HESS SHIPPING CORPORATION,

Appellant,

—against—,

ARGENTINE REPUBLIC,

Appellee.

UNITED CARRIERS, INC.,

Appellant,

—against—

ARGENTINE REPUBLIC,

Appellee.

FILED
SEP 11 1987

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States district Court for the Southern District of New York , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 86-7602

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of November one thousand nine hundred and eighty-seven.

UNITED CARRIERS, INC. AND AMERADA HESS SHIPPING CORPORATION,

Plaintiffs-Appellants,

-V-

ARGENTINE REPUBLIC,

Defendant-Appellee.

FILED
NOV 18 1987

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee-ARGENTINE REPUBLIC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERADA HESS SHIPPING CORPORATION,

Plaintiff,

—against—

ARGENTINE REPUBLIC,

Defendant.

OPINION

85 Civ. 4365 (RLC)

UNITED CARRIERS, INC.,

Plaintiff,

—against—

ARGENTINE REPUBLIC,

Defendant.

85 Civ. 4378 (RLC)

APPEARANCES

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JEANNE FERRIS SIEGEL

Of Counsel

CARTER, District Judge

The Argentine Republic, defendant in these two related actions, has moved to dismiss both of the complaints for lack of subject-matter jurisdiction by virtue of the Foreign Sovereign Immunities Act ("FSIA"), Pub.L. No. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d) and 1602-1611.

Plaintiff United Carriers, Inc. ("United Carriers"), a Liberian corporation, owned the Hercules, a crude oil tanker. Plaintiff Amerada Hess Shipping Corporation ("Amerada Hess"), also a Liberian corporation, time-chartered the vessel to transport Alaskan North Slope crude oil from Valdez, Alaska to a Hess oil refinery in the Virgin

Islands. Because her width precluded passage through the locks of the Panama Canal, the Hercules sailed between these two points by travelling around the southern tip of South America at Cape Horn.

On April 2, 1982, the Argentine Republic invaded the islands known as the Falklands to the English-speaking world, and as the Malvinas to the Spanish-speaking. Great Britain defended its crown colony off of the eastern coast of Argentina, and war between the two nations ensued. Throughout that war, Liberia remained a neutral nation. The Hercules, however, could not remain wholly disengaged from the post-colonial struggle raging in the South Atlantic. On May 5, while voyaging from Valdez to St. Croix, she diverted her course upon the request of the Argentine Navy in order to search for survivors of the General Belgado, an Argentine Navy cruiser sunk by a British submarine. She was later released from this task and completed her voyage to St. Croix.

On May 25, 1982, the Hercules began its return voyage in ballast, or without cargo, to Valdez. Without provocation or warning, Argentine military aircraft began to bomb the neutral merchant vessel three separate times on June 8: once at 1350 Greenwich Mean Time ("G.M.T."), when she was located at 46 degrees 10 minutes South latitude, 49 degrees 30 minutes West longitude; at 1430 G.M.T. when she was at 45 degrees 16 minutes South latitude, 48 degrees 27 minutes West longitude; and at 1625 G.M.T. when she was at 46 degrees 8 minutes South latitude, 48 degrees 55 minutes West longitude. Unaccountably, a belated directive to change course or suffer attack was received by the Hercules after the third attack, between 1720 and 1800 G.M.T. The complaints allege that the air attacks took place outside of the war zones designated by both the Argentine Republic and Great Britain. The bombing and rocket attacks damaged the decks and hull of the Hercules and left her with an undetonated bomb lodged in her starboard side. Thus disabled, she reversed course and sailed

towards Rio de Janeiro, Brazil, the nearest safe port of refuge. United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb and repair the Hercules. The tanker was scuttled 250 nautical miles off of the Brazilian coast.

Amerada Hess alleges that it has been unable to engage Argentine lawyers to pursue a claim for its losses in the Argentine Republic's courts. It attributes this failure to "the politically charged nature of the claim and knowledge that the claim is opposed by the Argentine Government." Verified Complaint of Amerada Hess, ¶ 44. Affidavits submitted in opposition to the motion to dismiss show that the attorneys for Amerada Hess have corresponded with two Argentinian lawyers who refused to press its claims in the Argentine courts. Amerada Hess and United Carriers seek to obtain relief from this court, alleging jurisdiction pursuant to the Alien Tort Act, 28 U.S.C. § 1350. Amerada Hess also alleges jurisdiction "according to the principle of universal jurisdiction, recognized in customary international law." Verified Complaint of Amerada Hess, ¶ 5.

DISCUSSION

Foreign sovereign immunity has a venerable history in this country's courts, dating back at least to Justice Marshall's decision in *The Schooner Exchange*, 11 U.S. (7 Cranch) 74 (1812). The doctrine developed over the next century and a half in a world of broadened state activity and burgeoning international trade. By the middle of this century, two aspects of foreign sovereign immunity that deserve mention had evolved. The first was substantive: the doctrine of "restrictive" immunity, which accords a foreign sovereign immunity for its public acts (*jure imperii*) but not for its commercial, or quasi-private, activities. The second was procedural: usually, but not always, foreign nations would seek immunity from the State Department, which would submit "suggestions of immunity"

to the courts where it determined that immunity was appropriate. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983). Political pressures exerted by foreign nations not infrequently affected the State Department's determination, *id.*, leading to lack of uniformity and clarity in the doctrine. In 1976, Congress sought to codify the restrictive doctrine of foreign sovereign immunity and to place responsibility for making determinations of immunity squarely within the judiciary. H.Rep. No. 94-1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted at* 1976 U.S. Code Cong. & Ad. News 6604, 6605. Congress was emphatic that the FSIA be the sole means of assessing claims of immunity. That interest is apparent from the structure of the FSIA, which unequivocally states that:

> Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. A foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case. The legislative history strengthens this reading. The House report states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." H.Rep. No. 94-1487 at 12; 1976 U.S. Code Cong. & Ad. News at 6610. Almost without exception, courts interpreting the FSIA have assumed that the FSIA is the exclusive source of jurisdiction over foreign sovereigns, *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) (*per curiam*), even in the context of other jurisdic-

tional grants. *O'Connell Machinery Co. v. M.V. Americana, 734 F.2d 115 (2d Cir.), cert. denied,* ___ U.S. ___ , 105 S.Ct. 591 (1984) (admiralty); *Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupar.qui"*, 639 F.2d 872 (2d Cir. 1981) (diversity); *In Re Korean Air Lines Disaster of September 1, 1983,* Misc. No. 83-0345 (D.D.C. September 1, 1985) (Alien Tort Act); *Siderman v. Republic of Argentina,* No. CV 82-1772-RMT(MCx) (C.D.Cal. March 7, 1985) (Alien Tort Act). *But see Von Dardel v. U.S.S.R.,* 623 F. Supp. 246 (D.D.C. 1985) (FSIA does not effect *pro tanto* repeal of Alien Tort Act jurisdiction).

Plaintiffs' claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA. The only provision for tort claims, where the foreign sovereign has not waived immunity, requires that the "damage to or loss of property" occur "in the United States."[1] Interpretation of similar language in terms of the commercial activity exception in § 1605(a)(2) has been breathtakingly broad. *See Crimson Semiconductor, Inc. v. Electronum,* 629 F. Supp. 903 (S.D.N.Y. 1986) (Carter, J.). Yet even that breadth is of no avail to these Liberian plaintiffs, who can claim no loss whatsoever occurring in the United States. In addition, one Court of Appeals has

[1] 28 U.S.C. § 1605(a)(5). That subsection denies a foreign state immunity where:

> money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreigns state while action withing the scope of his office or employment; except that this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

interpreted the legislative history of § 1605(a)(5) to require that the tortious act or omission itself occur in the United States. *Frolova v. U.S.S.R., supra,* 761 F.2d at 379. While we need not adopt that reasoning, we note that it is further evidence that the facts underlying this case are well beyond the purview of the § 1605(a)(5) exception.

Plaintiffs argue that the Alien Tort Act provides the basis for jurisdiction that the FSIA denies. That statute gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In their view, when the First Congress adopted the Judiciary Act of 1789—of which the Alien Tort Act is a part—it intended to confer jurisdiction over suits such as the instant case to federal district courts. Neither the FSIA itself nor its legislative history mentions the Alien Tort Act. Since repeal by implication is disfavored, the cause of action created by the Alien Tort Act survives the passage of the FSIA.

Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiffs' contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiffs' version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

No case law supports the assertion that a foreign sovereign state would not have enjoyed immunity in 1789. As evidence of their contention that a foreign sovereign would not be immune in the minds of the drafters of the Alien Tort Act, plaintiffs cite the fact that a sovereign would not enjoy sovereign immunity in its own prize courts. Nanda Affidavit at 5, Plaintiffs' Joint Exhibit 12. By anal-

ogy, they suggest, a foreign sovereign would not enjoy immunity in another nation's municipal courts. Contemporary legal theory recognizes hat foreign sovereign immunity, based on comity, is a very different matter from the sovereign immunity accorded the state in its own courts, based on separation of powers. The analogy would fail today; there is no reason to assume that it would have succeeded in 1789. Moreover, if we are to adopt the iconoclastic view that the Alien Tort Act preserves the vulnerability to suit of foreign sovereigns extant at its passage, we need evidence more forceful than a hypothetical argument by analogy. Plaintiffs also base their historical argument on two scholarly pieces, G. Badr, *State Immunity: An Analytical and Prognostic View* (1984) and S. Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), that discover the origin of nation-state—as opposed to personal—foreign sovereign immunity in *The Schooner Exchange,* decided in 1812. That inaccurate contention can quickly be disproven by recourse to early court reports. *Nathan v. Virginia,* 1 Dall. (Pa.) 77 (1781) granted the state of Virginia foreign sovereign immunity in Pennsylvania's courts.

Even if foreign sovereign immunity would have been extended to a nation under the circumstances of this case in 1789, the FSIA's grant of immunity is not a repeal of the Alien Tort Act. The Alien Tort Act speaks in terms of plaintiffs and causes of action. It is utterly silent as to classes of defendants. We may assume, without recourse to legal history, that a foreign sovereign could be sued under the Alien Tort Act if one were to regard the statute in isolation. Yet the FSIA does not repeal the Alien Tort Act because it narrows the class of defendants. It does the same to many of the jurisdictional statutes in the United States Code. The FSIA could only be said to repeal the Alien Tort Act if the statute covered *only* claims against foreign sovereigns, an argument that the plaintiffs do not, because they cannot, make. Thus, it is irrelevant

that repeal by implication is disfavored. The FSIA effects no repeal.

Plaintiffs next argue that foreign sovereign immunity is not absolute or requisite, and that the Argentine Republic's refusal to repay the plaintiffs is so manifest a violation of its obligation under international law that this country has a right to refuse it immunity. Let us assume that this argument is valid as a matter of international law. Nonetheless, that fact does not empower this court to create an *ad hoc* exception to a Congressional statute in order to hear this case. Federal courts, it bears mentioning at this juncture, are courts of limited jurisdiction. Perhaps Congress could empower federal courts to hear cases such as this; the court, however, is constrained by Congress's failure to do so.

Two district courts have already rejected arguments that the Alien Tort Act creates an implied exception to the FSIA. *Siderman, supra; Korean Air Lines, supra.* In *Siderman,* the court dismissed an action brought against Argentina and one of its provinces for torture and the taking of property by the former military regime. The court reviewed the legal history of foreign sovereign immunity and concluded that the Alien Tort Act "does not provide an exemption to foreign sovereign immunity. . . ." *Siderman,* slip op. at 3. In *Korean Air Lines,* the court dismissed wrongful death claims brought against the Soviet Union for deaths resulting when a commercial airplane that had strayed into Soviet territory was shot down. Although the court relied on both the FSIA and the act of state doctrine,[2] it clearly found that the Alien Tort Act did not carve out an exception to the FSIA's requirements. "[T]o

---

[2] The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964). It is a judge-made prudential doctrine.

hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act." *Korean Air Lines*, slip op. at 11.

Both *Siderman* and *Korean Air Lines* dismissed claims against foreign sovereigns for actions occurrin, within the foreign sovereign's territory. Yet that fact, relevant to application of the act of state doctrine, is not relevant to the question of foreign sovereign immunity at issue here. In *Siderman, Korean Air Lines*, and the instant case, a violation of the law of nations is alleged. Where the tort is committed outside of the United States, the effect of FSIA on the court's jurisdiction does not vary with the *locus delicti*. In addition, the Court of Appeals for the District of Columbia has assumed, albeit in dicta, that the standards of the FSIA apply to actions brought pursuant to the Alien Tort Act where the alleged tort has occurred outside of the foreign sovereign's territory. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 n.1 & 805 n.13 (D.C.Cir. 1984), *cert. denied*, ___U.S. ___, 105 S.Ct. 1354 (1985) (separate concurrences of Edwards, J. and Bork, J.).

The court has addressed plaintiffs' arguments in greater detail than they merit, given the clarity of the FSIA's language and the precedents that support this result. Such attention is warranted only because similar arguments have been accepted—incorrectly, we feel—in *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985). In *Von Dardel*, the court entered a default judgment against the Soviet Union in an action brought against it for the "unlawful seizure, imprisonment and possibly death" of Raoul Wallenberg, the heroic Swedish diplomat. In addition to waiver arguments inapplicable here, the court found that it had jurisdiction because the FSIA should not be read "to extend immunity to clear violations of universally recognized principles of international law." *Von Dardel*, 623 F. Supp. at 254. It based this interpretation on language in FSIA's

legislative history stating that the statute incorporated standards of international law. *Id.* at 253. Nothing in the FSIA or its legislative history supports that interpretation. The language cited by the *Von Dardel* court, H.Rep. No. 94-1487 at 14, 1976 U.S. Code Cong. & Ad. News at 6613, says merely that Congress sought to adopt internationally accepted standards of foreign sovereign immunity, not that immunity would be waived for violations of international law.

Finally, we note that the principle of universal jurisdiction cited by Amerada Hess in its complaint does not provide a basis for jurisdiction in a civil case. That doctrine only provides for criminal jurisdiction. *See* Restatement (2d) Foreign Relations Law of the United States §404 (Tent. Draft No. 2, 1981).

For all of these reasons, defendants' motions must be granted. Both complaints in these actions are dismissed.

IT IS SO ORDERED.

Dated: New York, New York
May 5, 1986

ROBERT L. CARTER
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

85 Civ. 4365 (RLC)

AMERADA HESS SHIPPING CORPORATION,
Plaintiff,

—against—

ARGENTINE REPUBLIC,
Defendant.

NOTICE OF SUIT
AND SERVICE OF
JUDICIAL DOCUMENTS

S I R:

PLEASE TAKE NOTICE That the above-captioned action has been commenced by United Carriers, Inc., [*sic*] against the Argentine Republic in the United States District Court for the Southern District of New York under Civil Action Number 85-4365. The following information is supplied without prejudice to plaintiff's position that this action arises under 28 U.S.C. z1350 [*sic*] (1982):

NOTICE OF SUIT

1. Title of legal proceeding: *Amerada Hess Shipping Corporation* v. *Argentine Republic*. Full name of Court: United States District Court for the Southern District of New York. Case Number: 85 Civ. 4365(RLC)

2. Name of foreign state concerned: Argentine Republic.

3. Identity of the other parties: United Carriers, Inc. has submitted a request to the Court that this case be treated as "related" to an action already pending before the Court which arises out of the same incident, namely *United Carriers, Inc.* v. *Argentine Republic*, 85 Civ. 4378 (RLC).

4. Nature of documents served:

Summons and Complaint.

5. Nature and purpose of the proceedings: Amerada Hess Shipping Corporation, Charterer of S/T HERCULES, brings suit for losses suffered as a result of bombing attacks by the Argentine armed forces on S/T HERCULES on or about June 8, 1982. The unprovoked attacks, without warning, on S/T HERCULES were in violation of the law of nations and of the laws of the United States, in that they were committed against the unarmed merchant vessel of a neutral country in innocent passage upon the high seas. As a direct result of the attacks, S/T HERCULES was caused to be scuttled on or about July 20, 1982. Damages are claimed in the amount of $1,901,259.07 plus interest.

6. Date of default judgment: Not applicable. A response to a "Summons" and "Complaint" is required to be submitted to the Court not later than thirty (30) days after these documents are received by you. The response may present jurisdictional defenses (including defenses relating to state immunity).

8. The failure to submit a timely response with the Court can result in a Default Judgment and a request for execution to satisfy the judgment. If a Default Judgment has been entered, a procedure may be available to vacate or open that judgment.

22 C.F.R. §93.2 (1984) recites the following paragraph for inclusion in a Notice of Suit:

9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).

It is the position of plaintiff Amerada Hess Shipping Corporation, however, that the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. §1350 (1982). The text of the Alien Tort claims Act is as follows:

> §1350. Alien's Action for Tort.
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Dated: New York, New York
June 24, 1985.

HILL RIVKINS CAREY LOESBERG O'BRIEN
& MULROY
(Attorneys for Plaintiff)

By:_____
A Member of the Firm

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Ministry of Foreign Affairs
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Buenos Aires, 1003,
Argentina

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

85 CIV 4378/(RLC)

UNITED CARRIERS, INC.,

Plaintiff,

—against—

ARGENTINE REPUBLIC,

Defendant.

NOTICE OF SUIT
AND SERVICE OF
JUDICIAL DOCUMENTS

S I R:

PLEASE TAKE NOTICE that the above-captioned action has ben commenced by United Carriers, Inc., against the Argentine Republic in the United States District Court for the Southern District of New York under Civil Action Number 8[illegible]1378. The following information is supplied without prejudice to plaintiff's position that this action arises under 28 U.S.C. §1350 (1982):

NOTICE OF SUIT

1. Title of legal proceeding: *United Carriers, Inc. v. Argentine Republic.*
Full name of court: United States District Court for the Southern District of New York. Case Number: 85 CIV 4378.

2. Name of foreign state concerned: Argentine Republic.

3. Identity of the other parties: Amerada Hess Shipping corporation. United Carriers, Inc. has submitted a request to the court that this case be treated as "related" to an action already pending before the Court which arises out of the same incident, namely *Amerada Hess Shipping Corporation v. Argentine Republic*, 85 CIV 4365 (RLC).

4. Nature of documents served:
Summons and Complaint.

5. Nature and purpose of the proceedings: United Carriers, Inc., owner of S/T HERCULES, brings suit for losses suffered as a result of bombing attacks by the Argentine armed forces on S/T HERCULES on or about June 8, 1982. The unprovoked attacks, without warning, on S/T HERCULES were in violation of the law of nations and of the laws of the United States, in that they were committed against the unarmed merchant vessel of a neutral country in innocent passage upon the high seas. As a direct result of the attacks, S/T HERCULES was caused to be scuttled on or about July 20, 1982. Damages are claimed in the amount of $10,000,000 plus interest.

6. Date of default judgment: Not applicable. A response to a "Summons" and "Complaint" is required to be submitted to the Court not later than thirty (30) days after these documents are received by you. The response may present jurisdictional defenses (including defenses relating to state immunity).

8. The failure to submit a timely response with the Court can result in a Default Judgment and a request for execution to satisfy The judgment. If a Default Judgment has been entered, a procedure may be available to vacate or open that judgment.

22 C.F.R. §93.2 (1984) recites the following paragraph for inclusion in a Notice of Suit:

> 9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).

It is the position of Plaintiff United Carriers, Inc., however, that the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. §1350 (1982). The text of the Alien Tort Claim Act is as follows:

> §1350. Alien's Action for Tort.
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Dated: New York NY
June 21, 1985

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By: Raymond J. Burke Jr.
A Member of the Firm

To: Lic. Dante Caputo
Minister of Foreign Affairs
Ministry of Foreign Affairs
Reconquista 1088

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First Secretary
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